

1 Richard T. Drury (SBN 163559)
richard@lozeaudrury.com
2 Rebecca Davis (SBN 271662)
rebecca@lozeaudrury.com
3 **LOZEAU DRURY LLP**
4 410 12th Street, Suite 250
Oakland, CA 94607
Telephone: (510) 836-4200
5 Facsimile: (510) 836-4205

6 [Additional counsel appearing on signature page]

7 *Attorneys for Plaintiffs*
ERIC MENDEZ and the proposed class
8

9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**

11
12 ERIC MENDEZ, individually and on
behalf of a class of similarly situated
13 individuals,

14 Plaintiff,
15

16 v.
17 PRICE SELF STORAGE
MANAGEMENT, INC.,
18

Defendant.

Case No. 3:15-cv-02077-AJB-JLB

**MOTION FOR AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
FINAL APPROVAL OF CLASS
ACTION SETTLEMENT**

Date: August 22, 2016
Time: 3:00 p.m.

The Honorable Anthony J. Battaglia

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Motion for Final Approval
of Class Action Settlement

Case No. 3:15-cv-02077-AJB-JLB

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1 **I. INTRODUCTION**

2 In accordance with the Court’s Preliminary Approval Order, Notice of the
3 class action Settlement Agreement reached in this Telephone Consumer Protection
4 Act, 47 U.S.C. § 227 *et seq.* (“TCPA”) case has been sent to the Settlement Class—
5 and the response has been overwhelmingly positive. At present **18.73%** of the
6 Settlement Class has filed claim forms seeking relief—a high claims rate for
7 consumer class actions and one that reflects the strength of the relief obtained for the
8 Settlement Class Members. Indeed, under the terms of the Settlement, Defendant
9 Price Self Storage Management, Inc. (“Defendant” or “PSS”) has created a
10 Settlement Fund in the amount of \$450,000 from which Settlement Class Members
11 may make claims for either \$750 cash payments or \$1,100 in certificates that can be
12 used to pay down any outstanding balance on the Settlement Class Members’
13 account with PSS or to secure future storage services with PSS. PSS has also agreed
14 to fix its text messaging system so as to properly honor and process requests to have
15 the messages “STOP”. This Settlement Agreement thus presents a significant
16 benefit to the Settlement Class Members and exceeds the typical amount awarded in
17 TCPA class actions.

18 Meanwhile, no one has objected to the Settlement and no Class Member has
19 filed a request to be excluded. As such, and as explained further below, the Court
20 should grant final approval to the Settlement consistent with the Order attached
21 hereto as Exhibit A.

22 **II. THE FACTS, THE LAW, AND THE LITIGATION HISTORY**

23 In or around January 2013, Plaintiff Mendez entered into an agreement for a
24 storage unit with PSS, and he provided his cellular telephone number to the
25 company in connection with his application. (Compl. at 5.) Shortly thereafter,
26 Defendant began sending messages to Plaintiff’s cellular phone number. (*Id.*) A
27 typical text message would read:

Eric, Please contact Price Self Storage about your storage acct. To discuss call 19092530098 or Pay at <http://cpl.me/3gf909> TXT STOP to Unsubscribe.

(*Id.*)

Plaintiff received the same or similar text messages for approximately six (6) months, when he decided that he no longer wished to receive them. (*Id.*) Following the instructions contained in the message, Plaintiff typed and sent “STOP” to unsubscribe from the texts. (*Id.*) Instead of honoring Plaintiff’s request, however, PSS, through its text messaging vendor, continued to send Plaintiff text messages. When Mendez responded “STOP”, some of these messages stated that PSS could not receive messages and to call the number listed to stop receiving messages. (*Id.*) Mendez then called the number contained in the messages and an operator informed him that in order to stop the text messages he would need to physically appear at a PSS location. (*Id.* at 5-6.) After informing the operator that he would be unable to physically travel to PSS’s location, the operator told Plaintiff that he could stop the text messages by replying “STOP.” (*Id.* at 6.) Like before, Plaintiff’s “STOP” response did not prevent the text messages from being sent to his cellphone.

In or around June or July of 2014, Plaintiff visited a PSS location to request his opt-out in-person. (*Id.*) There, a PSS employee informed Plaintiff that he would be removed from the text message list. Despite this assurance, just a few weeks later Plaintiff again started receiving text messages from PSS's system. (*Id.*) Plaintiff replied "STOP" to no avail for over a year. Mendez went back to PSS to make another in-person request that his number be removed from PSS's list. (*Id.*)

Congress enacted the TCPA in response to “voluminous consumer complaints” concerning “intrusive nuisance calls” made by automated telemarketing practices that it determined intruded upon the privacy of individuals. *Mims v. Arrow Fin. Servs. LLC*, 132 S. Ct. 740, 744 (2012). Through the TCPA, Congress made it “unlawful . . . to make any call . . . using any automatic telephone dialing system . . . to any telephone number assigned to a . . . cellular telephone service. . . .” 47 U.S.C.

1 § 227(b)(1)(A)(iii); *Mims*, 132 S. Ct. at 745. Subsequent decisions have held that
 2 the TCPA applies with equal force to the making of text message calls as it does to
 3 the making of voice calls to cellular phones. *Satterfield v. Simon & Schuster, Inc.*,
 4 569 F.3d 946, 954 (9th Cir. 2009); *Kramer v. Autobytel, Inc.*, 759 F. Supp. 2d 1165,
 5 1170 (N.D. Cal. 2010). The result of violating the TCPA is a statutory penalty of
 6 \$500 per message or call, as well as the availability of an injunction prohibiting the
 7 further transmission of such messages. 47 U.S.C. § 227(b)(3)(A-B). In addition,
 8 liability under the TCPA extends not only to the entity that physically transmitted
 9 the text messages, but also to any party responsible for the text messages. *Kramer*,
 10 759 F. Supp. 2d at 1170; *In re Jiffy Lube Int'l, Inc. Text Spam Litig.*, 847 F. Supp. 2d
 11 1253, 1256-58 (S.D. Cal. 2012).

12 Critically, under the TCPA consumers must have the ability to revoke consent
 13 once it has been provided. *See Rules and Regulations Implementing the Telephone*
14 Consumer Protection Act of 1991; American Association of Healthcare
15 Administrative Management, Petition for Expedited Declaratory Ruling and
16 Exemption; et al, CG Docket No. 20-278 (July 15, 2015) (“Omnibus TCPA Ruling”
 ¶ 47); *In re Rules and Regulations Implementing the Tel. Consumer Protection Act*
17 of 1991, Declaratory Ruling as to Petition of SoundBite Communications, Inc., CG
 18 Docket No. 20-278 (Nov. 29, 2012) (“SoundBite Ruling”); *see also Gager v. Dell*
19 Fin. Servs., LLC, 727 F.3d 265, 272 (3d Cir. 2013) (“In sum, we find that the TCPA
 20 provides consumers with the right to revoke their prior express consent to be
 21 contacted on cellular phones by autodialing systems.”).

22 The TCPA sets statutory damages in the amount of \$500 per violation
 23 (trebled to \$1,500 per text message if the violations are found to have been willful)
 24 and provides for injunctive relief prohibiting the further transmission of such
 25 messages. *See* 47 U.S.C. § 227(b)(3)(A-B).

26 Given his inability to make PSS stop texting him, Plaintiff filed his Class
 27 Action Complaint in the United States District Court for the Southern District of
 28 Motion for Final Approval
 of Class Action Settlement

1 California on September 17, 2015 alleging PSS violated the TCPA by, through the
2 use of an automatic telephone dialing system (“ATDS”), sending text messages to
3 Plaintiff without Plaintiff’s prior express consent and continued to send text
4 messages after Plaintiff had replied “STOP”, thereby revoking any previous
5 supposed consent. (*See* Dkt. 1.)

6 Shortly following the effectuation of service, PSS’s attorneys appeared in the
7 case and reached out to have an early discussion regarding their respective views of
8 the lawsuit’s merits and pitfalls. This allowed Class Counsel to engage in a frank
9 and transparent discussion about the case and enabled the Parties to set forth their
10 respective views of the claims.

11 Counsel decided during these early discussions that private mediation would
12 be helpful in potentially resolving the case. As part of this process, the Parties
13 agreed to engage in informal discovery (under a protective order to safeguard
14 confidentiality) regarding the size of the alleged class and the number of text
15 messages at issue. The information disclosed during this process allowed Plaintiff to
16 determine the size of the potential Class and to evaluate the probability of success
17 and the value of the claims in question. (Declaration of Steven L. Woodrow,
18 “Woodrow Decl.,” attached hereto as Exhibit A, ¶ 4.)

19 The Parties agreed to mediate the case in Denver, Colorado. As such, the
20 mediation was conducted on January 5, 2016 in Denver and was overseen by the
21 Honorable Matthew Railey (Ret.) of the Judicial Arbitration Group, Inc. (“JAG”).
22 (Woodrow Decl. ¶ 6.) Following extensive discussions facilitated by Judge Railey,
23 the Parties reached a Settlement Agreement. (Woodrow Decl. ¶ 7.) Only after the
24 Settlement was agreed upon in principle with respect to the relief to be made
25 available to the Settlement Class Members—here, substantial cash payments or
26 certificates for future storage—did the parties negotiate for reasonable attorneys’
27 fees for Class Counsel and an appropriate incentive award for Plaintiff Mendez.
28 (Woodrow Decl. ¶ 8.)

1 Plaintiff moved for preliminary approval on March 7, 2016. (Dkt. 29.)
 2 Defendant filed its Non Opposition to the Motion for Preliminary Approval on May
 3 9, 2016. (Dkt. 35.) The Court held a hearing on the Motion on May 12, 2016 (dkt.
 4 36) and granted Preliminary Approval on May 13, 2016. (Dkt. 37.) On July 1, 2016
 5 Class Counsel filed a motion seeking approval of the incentive award and for
 6 reasonable attorneys' fees. (Dkt. 38.) In accordance with the Settlement Agreement
 7 and the PAO, Class Counsel posted an electronic copy of their motion for
 8 reasonable attorneys' fees on Class Counsel's website as well. (Woodrow Decl. ¶
 9 13.)

10 **III. KEY TERMS OF THE SETTLEMENT AGREEMENT**

11 **A. Class Definition:** The Class is defined to include:

12 All persons in the United States of America or its territories who at any
 13 point from September 15, 2011 through the date of the Settlement
 14 Agreement: (a) received at least one text message on his or her cellular
 15 phone; (b) responded to the text message with the response STOP, and
 16 (c) received at least one additional text message from PSS apart from
 17 any message confirming the Person's STOP request.
 18 (Settlement § 1.7.)

19 **B. Settlement Fund and Monetary Payments.** Under the terms of the
 20 Settlement, PSS has agreed to establish a Settlement Fund consisting of \$450,000
 21 from which Class Members may make claims to receive individual cash payments
 22 of \$750 or certificates for \$1,100 to use in paying current or future storage fees with
 23 PSS. (Settlement § 1.36.)

24 All payments made pursuant to the Settlement will come from the Settlement
 25 Fund, including: (1) the payment of all claims (submitted and paid in accordance
 26 with the provisions below), (2) all administrative, notice, and claims expenses (the
 27 "Settlement Administration Costs"), (3) the incentive awards to the Class
 28 Representatives ("Incentive Award"), and (4) any award of reasonable attorneys'
 fees and reimbursement of expenses ("Attorneys' Fees and Costs") as approved by
 the Court. (Woodrow Decl. ¶ 10.)

1 **C. Prospective Service Enhancements.** In addition to the monetary
 2 relief, PSS has also agreed to take action to prevent such unlawful actions to
 3 continue in the future. As such, it has agreed to use commercially-reasonable efforts
 4 to honor requests from customers to stop or opt-out of receiving text messages from
 5 the company for a period of six (6) months from the Effective Date. (Settlement §
 6 2.2.) In reality, PSS already addressed this issue and stopped such text messages
 7 after this litigation was initiated. (Woodrow Decl. ¶ 11.)

8 **D. Notice and Administrative Expenses.** The Settlement requires that
 9 PSS pay the costs for disseminating notice to the Settlement Class as well as for all
 10 other administrative expenses. Such amounts are included within, and are to be paid
 11 from, the \$450,000 Settlement Fund. (Settlement § 1.36.)

12 **E. Class Representative Incentive Award.** In recognition of his service
 13 to the Settlement Class and in stepping forward to help secure the relief obtained via
 14 the instant Settlement, the Settlement calls for the Named Plaintiff/Class
 15 Representative, Eric Mendez, to receive an Incentive Award of \$3,000. (Settlement
 16 § 8.3.)

17 **F. Reasonable Attorneys' Fees and Expenses.** The Settlement further
 18 calls for Class Counsel to receive reasonable attorneys' fees as compensation for
 19 their work in obtaining the relief secured by the Settlement, including the significant
 20 monetary payments and the prospective relief. (Settlement § 8.1.) Settlement Class
 21 Counsel filed their Motion for Reasonable Attorneys' Fees and for Reimbursement
 22 of Expenses on July 1, 2016 in which they substantiated their fees and expenses in
 23 the litigation. (Dkt. 38.)

24 **G. The Release.** In exchange for the relief set forth above, the Settlement
 25 Class Members who do not exclude themselves release PSS from all TCPA claims,
 26 including comparable state law claims that could have been brought in the litigation.
 27 (Settlement § 1.30.)

1 Such terms are undeniably favorable to the Settlement Class. Accordingly,
 2 and given the positive response from the class members, the Court should grant final
 3 approval.

4 **IV. THE NOTICE COMPORTS WITH DUE PROCESS**

5 Before granting final approval of this Settlement, the Court is obligated to
 6 determine whether the notice provided to the Class is “the best notice that is
 7 practicable under the circumstances, including individual notice to all members who
 8 can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B); *accord*
 9 *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 173 (1974); *Silber v. Mabon*, 18 F.3d
 10 1449, 1454 (9th Cir. 1994). These safeguards ensure that notice to the class
 11 complies with both Rule 23 and the demands of due process. *Rannis v. Recchia*, 380
 12 F. App’x 646, 650 (9th Cir. 2010). Comporting with these standards does not
 13 require that every individual class member receive *actual* notice—due process
 14 mandates only that the notice be “reasonably calculated under the circumstances to
 15 apprise [class members] of the pendency of the class action and give [them] a
 16 chance to be heard.” *Ross v. Trex Co., Inc.*, No. 09-CV-00670, 2013 WL 791229, at
 17 *1 (N.D. Cal. Mar. 4, 2013). The Federal Judicial Center has determined that a
 18 notice plan that reaches at least 70% of the class is reasonable. FEDERAL JUDICIAL
 19 CENTER, *Judges’ Class Action Notice and Claims Process Checklist and Plain*
 20 *Language Guide* 3 (2010).

21 As for its contents, notice is satisfactory where it “generally describes the
 22 terms of the settlement in sufficient detail to alert those with adverse viewpoints to
 23 investigate and to come forward and be heard.” *Mendoza v. Tucson Sch. Dist. No. 1*,
 24 623 F.2d 1338, 1352 (9th Cir. 1980) *disapproved of on other grounds by Evans v.*
 25 *Jeff D.*, 475 U.S. 717, 106 S. Ct. 1531, 89 L. Ed. 2d 747 (1986); *see also* Alba Conte
 26 & Herbert B. Newberg, *Newberg on Class Actions* § 11:53 at 167 (4th ed. 2002)
 27 (notice is “adequate if it may be understood by the average class member.”). Rule 23
 28 requires that the notice must set forth the nature of the action, define the class to be

1 certified, identify the class claims and defenses at issue, and also explain to class
 2 members that they may enter an appearance through counsel if so desired, request
 3 exclusion from the settlement class, and that any judgment will be binding on all
 4 class members. *See Fed. R. Civ. P. 23(c)(2)(B).*

5 Following preliminary approval, the Parties, with the assistance of
 6 professional settlement administrator Kurtzman Carson Consultants LLC (“KCC”),
 7 faithfully adhered to the requirements of the Settlement, Rule 23, Due Process, and
 8 this Court’s Order by constructing and implementing a Notice Plan that included
 9 direct mail notice to all Settlement Class Members. (Declaration of Karen Rogan,
 10 (“Rogan Decl.”) attached hereto as Exhibit B, ¶¶ 2-4.) In order to establish the
 11 identity of Class Members and ensure that direct mail was especially effective, PSS
 12 provided the Settlement Administrator with a list of cellular telephone numbers to
 13 which the text messages at issue in this case were sent. (*Id.* ¶ 3.) From there, KCC
 14 was able to use a combination of reverse cell phone look-up searches to send 293
 15 direct mail notices to members of the Settlement Class. (*Id.* ¶ 4.) This direct and
 16 email notice proved especially effective, resulting in a rate of 83.5% of Class
 17 Members receiving direct notice. Further, on May 27, 2016, in compliance with the
 18 Class Action Fairness Act (“CAFA”), 28 U.S.C. § 1715(b), the Settlement
 19 Administrator cause to be mailed a letter enclosing the requisite court documents to
 20 the U.S. Attorney General and the Attorneys General of each state and U.S. territory
 21 giving notice of the Settlement. (*Id.* ¶ 4.)

22 The direct mail notice included a copy of the Claim Form and the “Long
 23 Form” notice approved by the Court, which provided full details regarding the rights
 24 of Class Members to object to or opt-out of the Settlement, notified Class Members
 25 that no further notice would be provided to them, and informed them that the
 26 Settlement had been preliminarily approved. All told, the Notice Plan achieved its
 27 projected saturation through direct notice and in the Settlement Administrator’s
 28 opinion comports with due process. (*Id.* ¶ 11.)

1 Furthermore, shortly after the Notice was mailed the Parties began receiving
 2 reports from the Settlement Administrator that were suggestive of a low claims rate.
 3 To address this perceived shortfall, Settlement Class Counsel's law firm obtained
 4 the list of cellphone numbers from the Settlement Administrator and began calling
 5 every class member to inform him/her of their legal rights under the agreement.
 6 (Woodrow Decl. ¶ 13.) Every Settlement Class Member who had yet to file a claim
 7 was called at least twice. (*Id.*) As a result of this extra effort the claims rate is
 8 presently 18.73%, which is of course high for a consumer TCPA class action.

9 The Settlement also featured the creation and maintenance of a Settlement
 10 Website (<https://eclaim.kccllc.net/caclaimforms/prz/home.aspx>) which was used by
 11 Class Members to download and submit claims.

12 Finally, in addition to implementing the methods of notice that resulted in
 13 reaching the greatest number of Class Members possible, the content of the notice
 14 was specifically designed so that it used simple, plain language encouraging
 15 readership and comprehension. (*See* Ex. A to Rogan Decl.) In sum, notice to the
 16 Class complied with the Court's Preliminary Approval Order, Rule 23, and Due
 17 Process, plainly comprising the "best practicable notice under the circumstances."

18 **V. THE SETTLEMENT WARRANTS FINAL APPROVAL**

19 Rule 23(e) provides that a class action shall not be dismissed or compromised
 20 without the approval of the court. Fed. R. Civ. P. 23(e); *Wren v. RGIS Inventory*
 21 *Specialists*, No. 06-CV-05778, 2011 WL 1230826, at *6 (N.D. Cal. Apr. 1, 2011).
 22 Having already determined that the settlement warrants preliminary approval, the
 23 final step in the approval process requires the court to make a final fairness
 24 determination. *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523,
 25 525 (C.D. Cal. 2004) (citing Manual for Complex Litigation, Third, § 30.41, at 236-
 26 37 (1995)). At this second, final approval stage, the court's analysis focuses on
 27 whether the proposed class action settlement "is fundamentally fair, adequate, and
 28 reasonable." *Officers for Justice v. Civil Serv. Comm'n of City and Cnty. of S.F.*,

1 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983)). A settlement
 2 typically meets these criteria where “the interests of the class are better served by
 3 the settlement than by further litigation.” *Garner v. State Farm Mut. Auto Ins. Co.*,
 4 No. 08-CV-1365, 2010 WL 1687832, at *8 (N.D. Cal. Apr. 22, 2010) (quoting
 5 Manual for Complex Litigation, Fourth § 21.61 (2004)). The decision to approve or
 6 reject the settlement rests soundly with the trial judge, though courts should give
 7 proper deference “to the private consensual decision of the parties.” *Garner*, 2010
 8 WL 1687832, at *8 (citing *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 965 (9th
 9 Cir. 2009) (“We put a good deal of stock in the product of an arms-length, non-
 10 collusive, negotiated resolution. . . .”)). In general though, the Ninth Circuit has
 11 recognized that there is a “strong judicial policy that favors settlement, particularly
 12 where complex class action litigation is concerned.” *Class Plaintiffs v. City of*
 13 *Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).

14 In determining if a settlement should be finally approved the trial court
 15 examines: “(1) the strength of the plaintiffs’ case; (2) the risk, expense, complexity,
 16 and likely duration of further litigation; (3) the risk of maintaining class action status
 17 throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery
 18 completed and the stage of the proceedings; (6) the experience and views of
 19 counsel; (7) the presence of a governmental participant; and (8) the reaction of the
 20 class members to the proposed settlement.” *Churchill Vill, L.L.C. v. Gen. Elec.*, 361
 21 F.3d 566, 575 (9th Cir. 2004) (*citing Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
 22 1026 (9th Cir. 1998)); *see also Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir.
 23 2012). No one factor carries more weight than others, and the importance of each
 24 factor will depend on “the unique facts and circumstances presented by each
 25 individual case.” *Officers for Justice*, 688 F.2d at 625. Moreover, in the Ninth
 26 Circuit, “[s]ettlements are afforded a presumption of fairness if (1) the negotiations
 27 occurred at arm’s length; (2) there was sufficient discovery; (3) the proponents of
 28 the settlement are experienced in similar litigation; and (4) only a small fraction of

1 the class objected.” *Schiller v. David's Bridal, Inc.*, No. 10-CV-00616, 2012 WL
 2 2117001, at *10 (E.D. Cal. June 11, 2012), *report and recommendation adopted*
 3 June 28, 2012 (citing 4 William B. Rubenstein, Alba Conte, & Herbert B. Newberg,
 4 *Newberg on Class Actions* § 11.41 (4th ed. West 2011)).

5 As set forth below, each of these considerations weighs in favor of approval.

6 **A. The Strength of Plaintiff's Case**

7 The first factor courts analyze is the strength of the plaintiff's case, which
 8 requires a balancing of the “likelihood of success on the merits and the range of
 9 possible recovery.” *Garner*, 2010 WL 1687832, at *9; *see also Shames v. Hertz*
 10 *Corp.*, No. 07-CV-2174, 2012 WL 5392159, at *5 (S.D. Cal. Nov. 5, 2012) (this
 11 analysis requires balancing “the vagaries of litigation and [] the significance of
 12 immediate recovery by way of the compromise to the mere possibility of relief in
 13 the future, after protracted and expensive litigation.”) (citing *Nat'l Rural*
 14 *Telecomms. Coop.*, 221 F.R.D. at 526). This analysis, however, does not require the
 15 Court to conduct a “speculative measure of what might have been awarded in a
 16 judgment in favor of the class,” or “reach any ultimate conclusions on the contested
 17 issues of fact and law which underlie the merits of the dispute, for it is the very
 18 uncertainty of outcome in litigation and avoidance of wastefulness and expensive
 19 litigation that induce consensual settlements.” *Nat'l Rural Telecomms. Coop.*, 221
 20 F.R.D at 526 (citations omitted). Additionally, in light of the numerous subjective
 21 criteria that necessarily handicap the potential range of recovery, “the Court may
 22 presume that through negotiation, the Parties, counsel, and mediator arrived at a
 23 reasonable range of settlement by considering Plaintiff[s'] likelihood of recovery.”
 24 *Garner*, 2010 WL 1687832, at *9 (citing *Rodriguez*, 563 F.3d at 965).

25 Plaintiff and Class Counsel are confident in the strength of their claims and
 26 believe that if the case were to proceed to summary judgment or to trial, they would
 27 likely succeed on the merits. Further, if Plaintiff were to succeed at trial the potential
 28 recovery for the Class would be significant. Given that the TCPA provides for \$500

1 in damages for each violation and there are hundreds of Class Members who
 2 received multiple calls, the potential recovery totals over one million dollars. *See* 47
 3 U.S.C. § 227(b)(3)(B). Precedent involving similar facts indicates that Plaintiff
 4 would have a strong chance of succeeding in both adversarial class certification and
 5 at summary judgment. *Lee v. Stonebridge Life Ins. Co.*, 289 F.R.D. 292, at *4 (N.D.
 6 Cal. Feb. 12, 2013) (certifying a nationwide class in a TCPA text message action);
 7 *Agne v. Papa John's Int'l, Inc.*, 286 F.R.D. 559, 572 (W.D. Wash. 2012) (certifying
 8 both a national and state subclass in a TCPA text message action); *Griffith v.*
 9 *Consumer Portfolio Serv., Inc.*, 838 F. Supp. 2d 723, 727-28 (N.D. Ill. 2011)
 10 (denying defendant's motion for summary judgment); *Bridgeview Health Care Ctr.*
 11 *Ltd. v. Clark*, No. 09-CV-05601, 2011 WL 4585028, at *6 (N.D. Ill. Sept. 30, 2011)
 12 (same).

13 Nonetheless, PSS repeatedly argued that it would either defeat class
 14 certification or that it would ultimately prevail on the merits because due to a variety
 15 of defenses, including the defense that the equipment it used does not qualify as an
 16 ATDS under the TCPA. While Plaintiff is confident, not all TCPA class actions
 17 succeed. *See, e.g., Thomas v. Taco Bell Corp.*, 879 F. Supp. 2d 1079, 1085-86 (C.D.
 18 Cal. 2012) (declining to extend the TCPA liability to entity on whose "behalf" text
 19 message was sent absent traditional agency relationship); *Green v. DirecTv, Inc.*,
 20 No. 10-CV-117, 2010 WL 4628734, at *3 (N.D. Ill. Nov. 8, 2010) (citing *In re*
 21 *Rules and Regulations Implementing the Telephone Consumer Protection Act of*
 22 *1991*, 7 FCC Rcd. 8752, 8769 (1992) and finding that plaintiff provided prior
 23 express consent to be contacted by providing her telephone number to defendants);
 24 *Gene and Gene, LLC v. Biopay LLC*, 541 F.3d 318, 327 (5th Cir. 2008) (stating that
 25 the predominant issue in a TCPA case "is undoubtedly one of *individual consent*").
 26 Considering that several of these issues remain untested, the uncertainty involved in
 27 challenging Defendant's arguments is a factor weighing in favor of the
 28 reasonableness of this Settlement.

Given the defense PSS was prepared to mount through experienced counsel, as well as the additional hurdles presented at class certification, a compromise benefitting both the Plaintiff and the Class represents a reasonable conclusion to this litigation. *See Bellows v. NCO Fin. Sys., Inc.*, No. 07-CV-01413, 2008 WL 5458986, at *7 (S.D. Cal. Dec. 10, 2008) (noting that “the very essence of a settlement agreement is compromise, ‘a yielding of absolutes and an abandoning of highest hopes’ . . . in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation.”) (citing and quoting *Officers for Justice*, 688 F.2d at 624.) And, considering the complexity of the issues still to be litigated as well as the very real potential that Defendant’s success could completely deprive the Plaintiff and Class of any relief whatsoever, the instant Settlement achieves a compromise that recognizes both the strengths and weaknesses of Plaintiff’s claims. *See Martin v. AmeriPride Servs., Inc.*, No. 08-CV-440, 2011 WL 2313604, at *6 (S.D. Cal. June 9, 2011) (instructing courts to determine “whether the decision to settle is a good value for a relatively weak case or a sell-out of an extraordinarily strong case.”). Given the strength of Plaintiff’s claims—and in consideration of the risk of further litigation as discussed more fully below—this factor favors approval of this Settlement.

B. The Risk of Continued Litigation

The second factor courts may consider is “the risk, expense, complexity, and likely duration of further litigation.” *Churchill Vill.*, 361 F.3d at 575. This requires a balancing of the “risk of continued litigation . . . against the certainty and immediacy of recovery from the Settlement.” *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1041 (N.D. Cal. 2008) (citing *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000)). When considering the immediate recovery provided by a fair settlement versus the uncertainty of continued litigation, “it has been held proper to take the bird in hand instead of a prospective flock in the bush.” *Kim v.*

1 *Space Pencil, Inc.*, No. 11-CV-03796, 2012 WL 5948951, at *5 (N.D. Cal. Nov. 28,
 2 2012) (quoting *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1323 (S.D. Fla.
 3 2005)). And, as indicated above, where several significant procedural hurdles yet
 4 remain, including anticipated summary judgment motions, adversarial class
 5 certification, and the possibility of appeals, these considerations favor approval of
 6 the settlement under this factor. *See Garner*, 2010 WL 1687832, at *10 (citing
 7 *Rodriguez*, 563 F.3d at 966).

8 The expense, duration and complexity of the protracted litigation sure to
 9 ensue in the absence of this Settlement would be substantial, and significant labor
 10 and expenses would certainly be expended on both sides in advance of class
 11 certification, summary judgment, expert witness discovery, and the briefing and
 12 arguing of a number of discovery motions, pre-trial motions, and evidentiary
 13 motions. Further, should this matter proceed to trial, the Parties would necessarily
 14 incur the expenses involved in months of preparation and the calling of witnesses
 15 and experts, potentially from across the country. *See Young v. Polo Retail, LLC*, 02-
 16 CV-4546, 2007 WL 951821, at *3 (N.D. Cal. Mar. 28, 2007). Given the potential
 17 for a statutory award totaling over one million dollars, the losing party would likely
 18 appeal the decision, resulting in the expenditure of even more time and money. In
 19 light of these inevitable expenses and the inherent risk involved in any continued
 20 litigation, the Court should find that the Settlement militates in favor of this factor.

21 **C. The Risk of Maintaining Class Action Status**

22 Exacerbating the inherent risk of pursuing and litigating the merits of this
 23 case is the unavoidable risk attendant to seeking adversarial class certification and
 24 then maintaining class status throughout the remainder of the litigation. This is
 25 especially tenuous given that “[a] district court may decertify a class at any time.”
 26 *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009) (citing *Gen. Tel.*
 27 *Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982)). Courts will consider this factor
 28 even where a settlement has been reached prior to a motion for class certification,

1 given that pre-certification concerns validate the risk both parties face should
 2 plaintiffs succeed or fail in certifying the class. *See Gardner v. GC Servs., LP*, No.
 3 10-CV-0997, 2012 WL 1119534, at *4 (S.D. Cal. Apr. 2, 2012) (recognizing the
 4 risk class certification poses for both parties and acknowledging the benefits of
 5 settlement prior thereto).

6 In this instance the Court’s May 13, 2016 Preliminary Approval Order
 7 certified a nationwide class for settlement purposes only. (Dkt. 37.) Thus, in absence
 8 of this Settlement, Plaintiff would first face a highly contested motion for class
 9 certification. Even if they were to succeed, Mendez would then run the risk of
 10 maintaining certification in the face of Defendant’s ability to move at any time to
 11 decertify the Class. Nonetheless, Class Counsel is confident that given the uniform
 12 nature of Defendant’s alleged conduct toward the Class, certification would be
 13 proper. This is because the key issues with regard to Defendant’s conduct are
 14 common ones: whether Defendant sent text messages after people responded
 15 “STOP,” whether responding STOP is sufficient to revoke consent, whether the
 16 equipment used to send such text messages falls under the statutory definition of an
 17 “automatic telephone dialing system,” and whether Defendants’ conduct violated the
 18 TCPA. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551, 2556 (2011)
 19 (explaining that commonality is found where the claims of all class members
 20 “depend upon a common contention,” and “[e]ven a single [common] question will
 21 do”) (modifications in original, internal quotations omitted). Yet, even though
 22 significant authority exists favoring the certification of TCPA class actions under
 23 similar facts, *Lee*, 2013 WL 542854, at *4, *Agne*, 268 F.R.D. at 572, there is always
 24 the very real possibility of the denial or decertification of the class as well. Thus the
 25 Court should find the decision to settle at this stage a reasonable one and supportive
 26 of the fairness of the Settlement.

27 **D. The Amount Offered in Settlement**

28 The next factor utilized in determining the overall fairness of a settlement

1 requires the Court to compare the actual settlement amount to the parties' estimates
 2 of the amount of damages that would have been recovered if the action were to be
 3 successfully litigated at trial. *Martin*, 2011 WL 2313604, at *6. In considering the
 4 ultimate potential recovery however, courts are instructed to be mindful of the perils
 5 faced along the way. *See Garner*, 2010 WL 1687832, at * 11 (noting that ““even
 6 where the total settlement fund is small,’ it may not be ‘unreasonable in light of the
 7 perils plaintiffs face in obtaining a meaningful recovery on their claims””) (citing *In*
 8 *re Critical Path, Inc.*, No. 01-CV-00551, 2002 WL 32627559, at *7 (N.D. Cal. June
 9 18, 2002)); *accord Jaffe v. Morgan Stanley & Co.*, No. 06-CV-3903, 2008 WL
 10 346417, at *9 (N.D. Cal. Feb.7, 2008) (“[t]he settlement amount could undoubtedly
 11 be greater, but it is not obviously deficient, and a sizeable discount is to be expected
 12 in exchange for avoiding the uncertainties, risks, and costs that come with litigating
 13 a case to trial”); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir.
 14 1998) (holding that the possibility “that the settlement could have been better ...
 15 does not mean the settlement presented was not fair, reasonable or adequate”). This
 16 factor is further strengthened where the settlement is “proposed after protracted
 17 arms-length and adversarial negotiation, during which time an experienced impartial
 18 mediator helped the Parties arrive at a compromise amount that both Parties find
 19 satisfactory.” *Garner*, 2010 WL 1687832, at *11.

20 This Settlement calls for Defendants to establish a \$450,000 Settlement Fund
 21 from which recipients of the alleged text messages may receive up to either a \$750
 22 payment or a certificate for \$1,100 in storage services in return.¹ Where, as is the
 23 case here, the class members' claims involve statutory damages, the court is not
 24 required to find “a specific monetary value corresponding to each of the plaintiff

25
 26 ¹ Given the number of text messages sent, liability in this case would amount to
 27 approximately \$500,000 (\$1,500,000 in the event willfulness is found). As such, the
 28 Settlement Fund represents almost 90% of the potential liability for non-willful
 violations.

1 class's statutory claims and compare the value of those claims to the proffered
 2 settlement award." *Lane*, 696 F.3d at 823. And though it seems axiomatic, the
 3 payment of a cash settlement to the class "is a good indicator of a beneficial
 4 settlement." *See Rodriguez*, 563 F.3d at 965.

5 Further, the results here are outstanding and exceed the amounts per claim
 6 typically available in TCPA settlements, which have included:

CASE NAME	AMOUNT PER CLAIMANT
<i>Rose v. Bank of Am. Corp.</i> , 2014 WL 4273358 (N.D. Cal. Aug. 29, 2014)	\$20.00 to \$40.00
<i>In re Jiffy Lube Int'l, Inc. Text Spam Litig.</i> , 11-md-2261 (S.D. Cal.)	\$12.97; or, \$17.29 voucher
<i>Kazemi v. Payless Shoesource, Inc.</i> , 09- cv-5142 (N.D. Cal.)	\$25.00 voucher
<i>In re Capital One Telephone Consumer Protection Act Litigation</i> , 12 C 10064 MDL No. 2416 (N.D. Ill. 2015)	\$34.60
<i>Steinfeld v. Discover Financial Services</i> , 12-cv-1118 JSW (N.D. Cal.)	\$48.69
<i>Bellows v. NCO Fin. Sys.</i> , 2008 U.S. Dist. LEXIS 13525 (S.D. Cal. 2008)	\$70.00
<i>Malta v. Fed. Home Loan Mortg. Corp.</i> , 10-cv-1290 BEN (S.D. Cal.)	\$84.82
<i>Wilkins, et al. v. HSBC Bank Nevada, N.A.</i> , 14 C 190 (N.D. Ill.)	\$102.62
<i>Gutierrez v. Barclays Grp.</i> , 10-cv-1012 (S.D. Cal.)	\$100.00
<i>Robles v. Lucky Brand Dungarees, Inc.</i> , 10-cv-4846-MMC (N.D. Cal.)	\$100.00
<i>Kramer v. B2Mobile</i> , 10-cv-2722 CW (N.D. Cal.)	\$100.00

1	<i>Lanza v. Upscale Events by Mosaic, LLC</i> , 13-cv-80093 DMM (S.D. Fla.)	\$150.00
2	<i>Ellison v. Steven Madden, Ltd.</i> , 11-cv-5935 (C.D. Cal.)	\$150.00
3	<i>Bayat v. Bank of the West</i> , C 13-2376 EMC (N.D. Cal.)	\$151.00
4	<i>Weinstein v. The Timberland Co., et al.</i> , 06-cv-454 (N.D. Ill.)	\$150.00
5	<i>Satterfield v. Simon & Schuster, Inc.</i> , 06-cv-2893 (N.D. Cal.)	\$175.00
6	<i>Rojas v. Career Education Corporation</i> , 10-cv-5260 (N.D. Ill.)	\$200.00
7	<i>Lozano v. Twentieth Century Fox Film Corp.</i> , 09-cv-6344 (N.D. Ill.)	\$200.00
8		
9		
10		
11		
12		

13 The instant Settlement is more than reasonable in light of these other
 14 settlements under the TCPA that have been approved as fair, reasonable and
 15 adequate. *See also In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d
 16 781, 789 (N.D. Ill. 2015) (discussing range of acceptable TCPA class settlements
 17 based on per claimant recovery, approving \$34.60 per claiming member); *Rose v.*
 18 *Bank of Am. Corp.*, 2014 WL 4273358, at *10 (N.D. Cal. Aug. 29, 2014)
 19 (discussing range of acceptable TCPA settlements and approving \$20.00 to \$40.00
 20 per claimant). Put simply, \$750 in cash and \$1,100 in storage services exceeds the
 21 relief obtained by these other industry settlements.

22 Furthermore, this valuation of the Settlement amount does not take into
 23 consideration the prospective relief that will aid in eliminating the complained-of
 24 conduct by protecting Class Members from further receipt of allegedly unauthorized
 25 text messages from Defendants. As noted above, the Settlement requires that PSS, to
 26 the extent it seeks to send text messages, must take reasonable steps to ensure that
 27 all opt out requests are honored. As a result, the value of the Settlement represents a
 28

1 more than adequate recovery for the Class.

2 **E. The Extent of Discovery Completed and the Stage of Litigation.**

3 Next, the Court may consider both “[t]he extent of the discovery conducted to
 4 date and the stage of the litigation” as indicators of class counsel’s familiarity with
 5 the case and ability to make informed decisions. *In re OmniVision*, 559 F. Supp. 2d
 6 at 1042 (citing *In re Mego Fin. Corp.*, 213 F. 3d at 459). There exists no specific
 7 stage of the proceedings, nor quantity of information gleaned from discovery, that
 8 automatically tips this factor in favor of settlement. Instead, “as long as the parties
 9 have sufficient information to make an informed decision about settlement, formal
 10 discovery is not a necessary ticket to the bargaining table.” *Gardner*, 2012 WL
 11 1119534, at *5 (quoting *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1239 (9th
 12 Cir. 1998)). Courts routinely find this factor satisfied even in cases that have not
 13 progressed beyond the pleadings stage, or where little or no formal discovery has
 14 been conducted. *See, e.g., In re Patriot Am. Hospitality Inc. Sec. Litig.*, MDL 00-
 15 1300, 2005 WL 3801594, at *2 (N.D. Cal. Nov. 30, 2005) (finding this factor
 16 satisfied and granting approval even where the case had not proceeded beyond the
 17 pleading stage and no formal discovery had taken place); *Odrick v. UnionBancal*
 18 *Corp.*, No. 10-CV-5565, 2012 WL 6019495, at *4 (N.D. Cal. Dec. 3, 2012)
 19 (approving settlement reached at the early stages of litigation and where little
 20 discovery was conducted).

21 Ultimately, all that is required is that the parties demonstrate a “clear view of
 22 the strengths and weaknesses of their cases.” *Bellows*, 2008 WL 5458986, at *8
 23 (quoting *In re Warner Comm’ns Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y.
 24 1985)). And where the parties demonstrate an understanding of the legal and factual
 25 issues at play, “[a]n initial presumption of fairness is usually involved if the
 26 settlement is recommended by class counsel after arm’s-length bargaining.” *Harris*
 27 *v. Vector Mktg. Corp.*, No. 08-CV-5198, 2011 WL 1627973, at *8 (N.D. Cal. Apr.
 28 29, 2011) (citations omitted).

1 In this case, the stage of the litigation has allowed for a meaningful amount of
 2 informal discovery and negotiations necessary to achieve the instant Settlement.
 3 After Plaintiff Mendez filed his initial complaint, the Parties engaged in frank
 4 settlement discussions that included the disclosure of relevant information regarding
 5 the size and scope of the class that would aid in negotiations. (See Woodrow Decl. ¶
 6 4.) This information, coupled with information regarding the nature of the “glitch”
 7 that lead to Defendant not being able to honor “STOP” requests, gave Class Counsel
 8 the information needed to properly value the claims. As such, the Parties had more
 9 than sufficient information on hand to evaluate their litigation position, further
 10 supporting the reasonableness of the instant Settlement.

11 **F. The Experience and Views of Counsel.**

12 The next factor warranting consideration is counsel’s experience and its own
 13 views about the adequacy of the Settlement. *Garner*, 2010 WL 1687832, at *14. As
 14 a general matter “[t]he recommendations of plaintiffs’ counsel should be given a
 15 presumption of reasonableness.” *In re OmniVision*, 559 F. Supp. 2d at 1043 (citing
 16 *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979)). Courts apply this
 17 presumption to settlements negotiated by experienced counsel given that “[p]arties
 18 represented by competent counsel are better positioned than courts to produce a
 19 settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pac.*
 20 *Enter. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). This factor is further
 21 strengthened when class counsel has specific experience in the type of claims being
 22 litigated. *See Martin*, 2011 WL 2313604, at *7; *see also Nat’l Rural Telecomms.*
 23 *Coop.*, 221 F.R.D. at 528 (“[g]reat weight is accorded to the recommendation of
 24 counsel, who are most closely acquainted with the facts of the underlying
 25 litigation.”).

26 Such a presumption is appropriate here given that Class Counsel specialize in
 27 the litigation of consumer class actions of similar size and complexity, and have
 28 litigated and settled numerous TCPA text-messaging class actions. (Woodrow Decl.

¶ 2, and Woodrow & Peluso, LLC Firm Resume, a true and accurate copy of which is attached as Ex. 1 to the Woodrow Decl.). This experience and familiarity steered Class Counsel’s efforts throughout this litigation and was a critical factor in obtaining the relief embodied by the Settlement, as well as ensuring that the Class received the highest quality of representation.

This factor is not limited only to the caliber of Class Counsel, however. To that extent, Class Counsel were pitted against highly experienced defense counsel from a top-tier national defense firm. Given such experience, it was only through extensive negotiations and a formal mediation that the Parties were able to reach this Settlement. Faced with the prospect of receiving nothing should Defendant succeed in any aspect of its defense, Class Counsel are confident that a Settlement Fund that provides \$750 in cash or \$1,100 in storage—in addition to the significant prospective relief—provides an exceptional result in this litigation. This factor thus also weighs in favor of final approval of the Settlement.

G. The Presence of a Governmental Participant

This case was not instituted by a government agency, and no governmental agency intervened or otherwise participated in this lawsuit. Some courts hold that such a result means that this factor does not apply to the Court’s analysis. *See Nat’l Rural Telecomms. Coop.*, 221 F.R.D. at 528. Thus this factor is either neutral, or if considered, favors final approval of this Settlement as there is no governmental actor presently working to secure relief on behalf of the Settlement Class.

H. The Reaction of Class Members to Date

The deadline for Class Members to object to or opt-out of the Settlement was set for July 14, 2016. All told, no individual has requested exclusion and not a single Class Member filed an objection to the Settlement. This absolute absence of objections provides strong evidence of favorability and demonstrates the strength and reasonableness of the Settlement. *See e.g. Churchill Vill.*, 361 F.3d at 577; *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (one objection out of Motion for Final Approval of Class Action Settlement

1 a potential class of 5,400); *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848,
 2 852 (N.D. Cal. 2010) (zero objections and sixteen opt-outs out of a class of 329
 3 members). Moreover, a whopping 18.73% of the Settlement Class Members has
 4 filed claims, a number that easily beats TCPA settlements approved by courts in this
 5 and other Circuits. *See Shames*, 2012 WL 5392159, at *14 (approving settlement
 6 with 4.9% claims rate and collecting authorities); *see also In re TJX Cos. Retail Sec.*
 7 *Breach Litig.*, 584 F. Supp. 2d 395, 397, 406 (D. Mass. 2008) (approving settlement
 8 with rate of slightly more than 3%); *In re Compact Disc. Minimum Advertised Price*
 9 *Antitrust Litig.*, 370 F. Supp. 2d 320, 321 (D. Me. 2005) (noting approval 2% rate);
 10 *Strong v. BellSouth Telcoms., Inc.*, 173 F.R.D. 167, 169, 172 (W.D. La. 1997)
 11 (4.3%); *Forcellati v. Hyland's Inc.*, 2014 WL 1410264, at *6 (C.D. Cal., Apr. 9,
 12 2014); (“[T]he prevailing rule of thumb with respect to consumer class actions is 3-5
 13 percent.”). These results, specifically the absolute lack of opposition to the
 14 Settlement, favor a finding of reasonableness and warrant final approval.

15 **I. There is No Evidence of Collusion**

16 In addition to the foregoing factors, the Ninth Circuit has instructed courts to
 17 carefully scrutinize cases that are settled prior to class certification for signs of
 18 possible collusion. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946-
 19 47 (9th Cir. 2011). These signs include instances where (1) class counsel receives a
 20 disproportionate distribution of the settlement or the class receives no monetary
 21 distribution, (2) unawarded funds revert to the defendants rather than to the
 22 settlement fund for the class, and (3) a “clear sailing” fee arrangement provides for
 23 the payment of attorneys’ fees separate and apart from class funds exists. *Id.* When
 24 these signs are present in a settlement, “the Court must ‘examine the negotiation
 25 process with even greater scrutiny than is ordinarily demanded.’ *In re HP Laser*
 26 *Printer Litig.*, No. SACV 07-0667 AG RNBX, 2011 WL 3861703, at *4 (C.D. Cal.
 27 Aug. 31, 2011) (quoting *In re Bluetooth*, 654 F.3d at 947).

28 This Settlement Agreement is entirely free of collusion though its terms may
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 of Class Action Settlement

1 raise the concerns identified by the Ninth Circuit's decision in *In re Bluetooth*. First,
 2 Class Counsel are not receiving a disproportionate amount of the Settlement. Class
 3 Counsel's fee request represents 22% of the monetary benefit of the Settlement, a
 4 percentage that falls below the Ninth Circuit benchmark of 25% in common fund
 5 cases.² *In re Bluetooth*, 654 F.3d at 942; *see also Powers v. Eichen*, 229 F.3d 1249,
 6 1256 (9th Cir. 2000). Further, in *In re Bluetooth* the court was faced with a
 7 settlement that did not provide any monetary payments to Class Members, a stark
 8 contrast to the \$750 payments and \$1,100 certificates available to Class Members
 9 here. *In re Bluetooth*, 654 F.3d at 945. In addition, Class Counsel is seeking its fees
 10 as a percentage of the total value created by the Settlement, rather than requesting an
 11 amount separate and apart from the funds paid to the Class. *Staton v. Boeing Co.*,
 12 327 F.3d 938, 970 (9th Cir. 2003); *In re Bluetooth*, 654 F.3d at 948-49. Thus the
 13 first factor typically indicative of collusiveness is absent from this Settlement.

14 Second, while this Settlement does in fact provide for a reversion of funds to
 15 the Defendant, there is nothing *per se* improper about a reverter clause, especially in
 16 cases such as this where the claims rate was uncertain at the outset, *see McKinnie v.*
 17 *JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 813 (E.D. Wis. 2009), and
 18 where the case does not involve the disgorgement of ill-gotten gains back to
 19 consumers. *Nabal v. BJ's Wholesale Club, Inc.*, No. 02-2604, 2002 WL 32349137
 20 (E.D. Pa. Aug. 2, 2002). Further, the court's concerns in *In re Bluetooth* surrounding
 21 a reverter clause focused on its presence in addition to a clear sailing provision only
 22 if they worked in conjunction to provide for unreasonably high attorneys' fees at the

24 ² In accordance with this Court's Order granting Preliminary Approval to the
 25 Settlement (dkt. 37), Class Counsel filed its Motion for Approval of Attorneys' Fees
 26 and Class Representatives' Incentive Awards on July 1, 2016 and posted a copy of
 27 the Motion to the Woodrow & Peluso, LLC firm website. (Woodrow Decl. ¶ 14.) A
 28 more thorough discussion of the reasonableness of Class Counsel's fee request may
 be found therein, including an analysis of fee awards in comparable cases approved
 by courts in the Ninth Circuit.

1 expense of any relief to the Class. *In re Bluetooth*, 654 F.3d at 949. In contrast, this
 2 Settlement provides significant monetary relief to the Class and a proportional fee
 3 award. To that end, courts throughout the country have approved similar settlements
 4 under the TCPA that also involved a similar reverter. *See, e.g., Kramer v. Autobytel,*
 5 *Inc.*, No. 10-CV-2722, dkt. 121-1 (N.D. Cal. July 18, 2011).

6 Finally, while the Settlement includes a “clear sailing” provision, the
 7 requested fees were negotiated solely as a percentage of the overall value of the
 8 Settlement, a condition that inextricably links Class Counsel’s fees to the value
 9 obtained for the Class. Similar to the mere presence of a reverter, a “clear sailing”
 10 provision in and of itself is not an indication of collusiveness, and courts, including
 11 those in the Ninth Circuit, “recognize[] that clear sailing agreements are routinely
 12 accepted in both the federal and California courts.” *Hartless v. Clorox Co.*, 273
 13 F.R.D. 630, 645 n.6 (S.D. Cal. 2011); *see also In re Consumer Privacy Cases*, 175
 14 Cal. App. 4th 545, 553 (Cal. Ct. App. 2009); *Malchman v. Davis*, 761 F.2d 893, 905
 15 n.5 (2nd Cir. 1985). Like its concerns in regards to reverter clauses, the *Bluetooth*
 16 court also cautioned against clear-sailing provisions where the requested fee is
 17 agreed upon independently of the amount provided for the class, not by its mere
 18 presence in a settlement. *In re Bluetooth*, 654 F.3d at 947. This is because such an
 19 arrangement can enable a Defendant to “pay class counsel excessive fees and costs
 20 in exchange for counsel accepting an unfair settlement on behalf of the class.” *Id.*
 21 (citation omitted). This Settlement raises no such concern as Class Counsel have
 22 negotiated and requested their fees to be a percentage of the total Settlement.
 23 Accordingly, this factor also demonstrates a lack of collusion between the Parties
 24 and favors approval of the Settlement.

25 In conjunction with the factors raised in *Bluetooth*, courts may also look to
 26 both the assurances of counsel and the presence of a neutral mediator as factors
 27 “weighing in favor of a finding of non-collusiveness,” though neither is “on its own
 28 dispositive.” *Id.* at 948. This case was settled only after a formal full day mediation

1 session with a well respected former jurist who ensured that the process was
2 conducted at arms' length to ensure no collusion. *See e.g. Wren*, 2011 WL 1230826,
3 at *14; *In re HP Laser Printer Litig.*, 2011 WL 3861703, at *4. Thus, even when
4 placed under the stricter lens of scrutiny established by *Bluetooth*, the Settlement
5 remains free of any of the collusive elements cautioned against, compares favorably
6 to numerous other TCPA settlements approved throughout the nation and most
7 importantly, represents an extraordinary victory for the Class.

8 In short, each of the factors supports granting final approval to the Settlement.

9 VI. CONCLUSION

10 For the foregoing reasons, Plaintiff Mendez respectfully requests the Court
11 enter an Order granting Final Approval to the Class Action Settlement reached in
12 this case and provide such other and further relief as the Court deems reasonable and
13 just.

14 Dated: August 4, 2016

15 Respectfully Submitted, **Eric Mendez**,
16 individually and on behalf of the Settlement
17 Class

18 /s/ Steven L. Woodrow

19 _____
20 One of Plaintiff's Attorneys

21 Richard T. Drury
richard@lozeaudrury.com
22 Rebecca Davis
rebecca@lozeaudrury.com
23 LOZEAU DRURY LLP
410 12th Street, Suite 250
24 Oakland, CA 94607
Telephone: (510) 836-4200
Facsimile: (510) 836-4205

25 Steven L. Woodrow*
(swoodrow@woodrowpeluso.com)
26 Patrick H. Peluso*
(ppeluso@woodrowpeluso.com)
27 Woodrow & Peluso, LLC
3900 East Mexico Ave., Suite 300

1 Denver, Colorado 80210
2 Telephone: (720) 213-0675
3 Facsimile: (303) 927-0809

4 Stefan Coleman, Esq.
5 LAW OFFICES OF STEFAN COLEMAN, LLC
6 201 S Biscayne Blvd, 28th Floor
7 Miami, Florida 33131
8 Telephone: (877) 333-9427
9 law@stefancoleman.com

10 **pro hac vice*

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CERTIFICATE OF SERVICE

2 The undersigned certifies that, on August 4, 2016, I caused this document to
3 be electronically filed with the Clerk of the Court using the CM/ECF system, which
4 will send notification of filing to counsel of record for each party.

/s/ Steven L. Woodrow